No. 11381

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HYMAN STILLMAN and LOU SEGAL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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Statutes and Regulations Involved.

Section 37 of the Criminal Code, 18 U. S. C. 88, provides as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Section 4 of the Emergency Price Control Act of 1942 (50 U. S. C. App. 904) provides in part as follows:

> "It shall be unlawful, regardless of any contract, agreement * * * or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, * * * or otherwise do or

omit to do any act, in violation of any regulation or order * * * of any price schedule effective in accordance with the provisions of this Act."

Section 202(b) of the Emergency Price Control Act of 1942 (50 U. S. C. A. 922(b)) provides as follows:

"The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, * * * to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, * * *."

Section 205(b) of the Emergency Price Control Act of 1942 (50 U. S. C. A. 925) provides in part as follows:

"Enforcement.

* * * * * * * *

"(b) Any person who willfully violates any provision of section 4 of this Act (section 904 of this Appendix), and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202 (sections 902 or 922 of this Appendix), shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than * * * one year * * * or to both such fine and imprisonment * * *."

Maximum Price Regulations 148, 169 and 239 are the Regulations of the Office of Price Administration making detailed provisions with reference to specific products of the type involved in this case. These Regulations, in so far as they apply to this case, are set forth in the Appendix to this brief.

Statement of Facts.

The indictment in this case consisted of fifty counts. The appellants, Stillman and Segal, were both found guilty of the same counts, namely, twenty-three in number. For reasons unimportant to this appeal the other counts were dismissed; excepting as to Count 26, they were dismissed after the Government had abandoned the same by not offering any evidence concerning such counts.

The first count charged a conspiracy to violate the Emergency Price Control Act of 1942, 50 U. S. C. App., Sec. 901 *et seq.* The conspiracy count referred to certain Revised Maximum Price Regulations pertaining to the sale of meat, the most important of which is Regulation 169, pertaining to beef and veal. The remaining counts of the indictment charge substantive offenses of two types, *i. e.,* in excess of the legal maximum price allowed and falsification of entries and documents required to be kept under the provisions of the Emergency Price Control Act and Regulations. The substantive counts were likewise predicated upon 50 U. S. C. App., Sec. 901 *et seq.*

The counts on which both appellants were found guilty are identified as follows:

Count 1—conspiracy count (from July 1, 1943, to March 11, 1946).

The counts charging over-ceiling sales are the following:

Counts 2, 3, 4, 5, 6, 45, 46, 47, 48, 49 and 50. (These offenses are charged to have occurred at specific dates from about August, 1944, through March, 1945.)

The counts charging false entries or falsification of records, of which appellants were found guilty, are Counts 12, 13, 32, 37, 38, 39, 40, 41, 42, 43 and 44. (These

offenses likewise are charged to have occurred from about September, 1944, through March, 1945.)

The evidence indicated that the appellants and others had sold wholesale cuts of meat to various retail butchers at prices in excess of the invoice reflected price. Invoices issued for each sale of meat carried the maximum ceiling price as of the date of such sales; in addition, appellants caused an over-ceiling price to be obtained in cash. The evidence indicated that the price per pound obtained in excess of the invoiced price per pound, or ceiling price, varied from one to eight cents per pound, in most instances being from four to five cents per pound in excess thereof.

Government's witness Edward F. Cunningham [R. 288 to 291] was a Price Specialist of the Office of Price Administrator during the pertinent periods. Witness Cunningham was shown the various invoices or exhibits having been received into evidence and was prepared to testify concerning the maximum price as the same applied to each meat item as of the dates of the specific sales, whereupon counsel for the appellants stipulated with counsel for the Government that the prices shown for the meat items, beef, veal, pork products, etc., on the invoices were the maximum ceiling prices for those items on the dates of sales [R. 290]. The case was submitted to the jury under this theory, as is reflected in one of the court's instructions [R. 362]. No objection was made by counsel for appellants to such instruction.

For the purpose of convenience we have attached to the close of this subheading a chart of the various Government's exhibits, together with the specific counts that such exhibits were offered in support of. This index of exhibits may be helpful. It should, however, not be construed as an admission that the other exhibits, to which no

particular count is referred, were not also offered in support of the entire case.

Appellants, Stillman and Segal, were first engaged in the wholesale meat business, as partners, from about August, 1944, to January, 1945, under the name of Southern California Meat Company No. 2.

Later, the appellants entered into a partnership with another person not on trial, namely, Aaron Rosensweig [R. 154], for the purpose of conducting a meat business known as the "Central Packing Company." This later partnership started about January 1, 1945, for the purpose of buying, slaughtering cattle, and disposing of and selling the meat [R. 156].

The understanding was that appellant Stillman was the "head man at the office" and operated the office [R. 157]. Rosensweig's obligation was to buy and provide cattle for the business. Appellant Segal was to take care of the plant operations, cooler, salesmen, etc. [R. 156]. This business operated for a brief period of about three months [R. 158], following which the books of the Central Packing Company (the copartnership) was taken by Mr. Rosensweig to a Mr. Namson, also a witness, for the purpose of having income tax returns prepared. Shortly after this partnership had been terminated the assets were divided between the three partners, as is reflected by the checks [Government's Exhibits 12, 13 and 14].

Witness Samuel Namson [R. 139] testified as to certain statements made in his office during either the month of March or April, 1945, by the appellants Stillman and Segal. These statements or admissions were made with respect to Government's Exhibits Nos. 10 and 11, being certain pages from the books of the Central Packing Company.

Witness Namson stated that he, as an accountant, in his desire to prepare the income tax returns for a former partner, Mr. Rosensweig, had had conversations with both Stillman and Segal [R. 142], and had discussed with them entries in the books of their partnership [Exhibits 10 and 11], and particularly he discussed with reference to an entry in the journal of $30,100 [R. 142-143]. During this conversation witness Namson stated that Stillman told him, Namson, that this money reflected a credit entry from the sale of meat to different customers, and that appellant Stillman stated, "that this is money which has been accumulated from sale of meat to different customers and he called his bonuses over and above the ceiling prices that they paid" [R. 143]. Witness Namson further inquired of both Stillman and Segal why this $30,100 was not entered to "sales" instead of crediting it to different partners, and then stated that Stillman said they were bonuses and didn't consider them as sales [R. 143-144].

Witness Namson continued, and stated that he called attention to Stillman and Segal that by a correct entry, namely, after the entry crediting the sales with $30,100, that that naturally increased the sales from $1,236,000.00 to $1,266,000.00. This testimony pertained to Government's Exhibit 10 [R. 144-145]. Witness Namson stated that he corrected the trial balance accordingly, thereby increasing the sales, and that Mr. Stillman put the item on the document in his presence on that day.

Namson further testified that Stillman stated: "We are in a partnership or joint venture. Three of us invested an equal amount of money" [R. 147]. Upon cross-examination the witness Namson again stated that Stillman, in the presence of Segal, had admitted the receipt of a sizeable sum of money from the operation of the business, namely,

as bonuses from the sale of meat over and above the ceiling price [R. 149-150].

Various retail meat dealers testified concerning specific purchases they had made, to the effect that they had paid per pound for meat a sum in excess of that reflected by the various invoices introduced into evidence.

Witness William Muehlberger [R. 85] stated that during the fall of 1944 he was acquainted with both Stillman and Segal and that he, witness, conducted a retail market in the vicinity. Witness was shown Exhibit 1, an invoice bearing Serial No. 6034, which pertained to Count 3 [R. 88], and testified that he had bought the merchandise reflected on the invoice and paid for same, and that in addition he had paid a sum over the amount reflected on the invoice, having paid this money to Stillman at the plant known as "Southern California Meat Company," on East Vernon Street [R. 90]. Witness stated that in addition to the check with which he paid for the meat, as per the invoice, he paid an additional sum of money; that he believed it was $120.00 [R. 92]. That he had had a discussion with Stillman at or about this time, concerning whether he could get some meat, and that Stillman stated, "Yes, it will be five cents over, Bill" [R. 93]. Witness Muehlberger gave like testimony concerning over-payments of approximately five cents per pound with reference to invoice Serial No. 6109, offered in support of Count 2 [Government's Exhibit 2], stating that he paid five cents a pound in addition to the invoice price [R. 95]; that this sum was paid in cash and that he received no receipt for the cash payment [R. 98].

Another retail meat merchant who testified was Horace Greeley Weaver [R. 107]. He was an employee of a concern known as the "Clover Meat Company." He stated

that during 1945, he had a conversation with Segal with regard to purchasing meat for his employer and they held this conversation at the plant on East Vernon Avenue, known as the Southern California Meat Company. Witness stated that in the conversation with Segal he inquired, "How much do you want over for it, Lou?" and that Segal (Lou) stated, "Five cents." I said, "All right, give me some beef" [R. 111].

Witness identified Invoice No. 718, offered in support of Count 13, and stated he procured this meat and paid for it by check in the full amount of the invoice; that he had paid money to Segal in addition to the check for the meat so obtained [R. 113], for which he did not obtain a receipt; that this was a cash payment.

Witness Weaver then referred to Exhibit No. 4, offered in support of Count 5, and stated he had paid for this meat by check [R. 115-116], and that in addition he paid five to eight cents a pound but that he was not sure as to which invoice he paid five cents, or as to which invoice he paid eight cents a pound [R. 116].

Witness Weaver gave similar testimony concerning several other transactions wherein he stated he paid sums of money in cash to Segal for meat obtained over and above the invoiced amount.

Witness Leo Blank, an employee for a meat concern, stated that he knew both Stillman and Segal [R. 180], and that he had paid to Lou Segal, first a penny a pound over the invoiced amount [R. 182]; later, he had paid from one to four cents a pound over the invoiced listing [R. 184-185]. This witness testified similarly to various invoices that were offered in support of various other substantive counts.

Clarence S. Wright [R. 214], engaged in the meat business, gave similar testimony concerning payment of moneys in addition to the amount reflected on the invoice. He, in particular, stated that he made his payments to a person by the name of "Irving," to whom Segal had told him he should make such payments [R. 220]. He stated that he paid two cents per pound for beef over the amount reflected on the invoice [R. 222].

Witness Donald Oliver Bircher [R. 231], Special Agent of the Bureau of Internal Revenue, gave testimony concerning an interview he had requested of appellant Segal, stating that Segal had called at the Government office on June 9, 1945 [R. 245]; that Segal gave a voluntary statement after having been advised of his rights [R. 246], and that he was then inquiring concerning the income tax liability of Segal and that of the partnership known as the Southern California Meat Company No. 2.

Witness stated that the interview had been taken down by a stenographer and that, later, on June 15, 1945, Segal had returned to the office and that the statement theretofore taken had been signed by Segal on June 15, 1945 [R. 251]. This is Government's Exhibit No. 33. Bircher had been subpoenaed by the Government.

In conformity with the requirements as provided by 26 U. S. C., Sec. 55, with regard to the publicity of returns, and likewise with the Treasury decisions providing for their utilization by the Department of Justice, certain correspondence and telegrams were introduced in evidence to justify the Government's position in using such returns, and likewise in obtaining the testimony of the Internal Revenue Agents Bircher and Phoebus, who both gave testimony concerning, first, the interview with Segal and the

taking of his statement [Government's Exhibit 33], and the testimony that Agent Phoebus gave concerning his conversations with the appellants, Stillman and Segal.

Both of these investigations were in the spring and summer of 1945, and pertained to an investigation being conducted by the Internal Revenue, of the income tax liability of Stillman and Segal and their business under the copartnership names.

The documents which were admitted into evidence and which we feel thoroughly comply with the requirements for prior authority and for the utilization of such returns, and the obtaining of the testimony of the Internal Revenue Agents Bircher and Phoebus, are the following:

Government's Exhibit 30, being a letter from the Acting Commissioner of the Bureau of Internal Revenue, granting authority for Agent Bircher to testify and cooperate with the Government in connection with the investigation being conducted in this case.

Government's Exhibit 32, being two letters, one of which was a carbon copy of a letter dated September 27, 1945, from the then United States Attorney to the Attorney General, requesting that authority be obtained from the Commissioner of Internal Revenue, as there indicated, and the original letter of October 5, 1945, being a reply by the Attorney General, to such letter.

Government's Exhibit 34, being a telegram from the Commissioner of Internal Revenue, authorizing the testimony of Agents Bircher and Phoebus, and others, in conjunction with this case and other investigations being conducted.

Government's Exhibit 38, being a letter from the Acting Commissioner of Internal Revenue, granting authority as

outlined in said letter to Agent Phoebus, in connection with this case.

It is thus apparent that compliance was had with the statute and the Treasury decisions with regard to inspection, utilization and the obtaining of testimony relevant to information possessed by said Special Agents in conjunction with their investigation of the income tax matters of both appellants.

Government's Exhibits 35, 36 and 37 are certified copies of returns, all for the calendar year 1944, dealing with either one or the other of the appellants or their co-partnership, the Southern California Meat Company.

Portions of Government's Exhibit 33, a statement that Segal gave, was read into evidence [R. 253]. It should be noted that this testimony was limited to Mr. Segal [R. 302-304].

In this statement Segal stated that in 1944 he and Stillman went into business under the name of Southern California Meat Company No. 2 [R. 255]. Segal stated that while he was engaged in this business, early in 1944, he made collections in the form of "gift money" [R. 257], in addition to the prices received from the sale of meat. Segal conceded that he sold his meat at the regular OPA ceiling price and sometimes received from customers sums of money in addition [R. 257]. Segal stated that most of the customers gave him funds on the side when the meat was sold [R. 258], and that the money was generally paid to him by putting it in his white coat pocket; that no change was ever asked in these donations [R. 260]. Segal stated that early in 1945 he had counted this money and had between $13,000.00 and $14,000.00 [R. 261].

Segal stated that he received this side money from August, 1944, until the end of that year; "when I was in the cooler they put some money in my pocket," and that the majority of meat customers made such payments [R. 264]; that they were becoming more generous [R. 265]. That his biggest day had been just before Christmas; this amounted to $2800.00 [R. 266]. That during the year 1945 the amount received as "contributions," or side money, was approximately $15,000.00 [R. 268]. (This was but for three months.) That he had considered these payments as "extra profits," or "extra gifts" [R. 276]. That the profit for 1944 from customers was approximately $25,000.00 from "side money" payments [R. 279].

Special Agent Samuel A. Phoebus, of the Bureau of Internal Revenue, also testified for the Government [R. 292-308]. He, like Agent Bircher, had also been subpoenaed. This witness was in a position to give corroborative testimony concerning the interview had with appellant Segal, as is reflected by the written statement [Government's Exhibit 33], as he was present when it was taken [R. 307]. It was stipulated that his answers would be similar to those of the previous agent, Bircher [R. 308].

Witness Phoebus, as previously indicated, also had authority to testify. Among other things he stated that in April of 1945, he talked with Stillman and was handed a book of the Southern California Meat Company [R. 294]; that this was handed to him in response to his request to look at such books [R. 295]. This book became Government's Exhibit 39. Certain pages of it were broken down into 39-a, 39-b and 39-c. Witness Phoebus stated that he discussed certain entries in the pages of this book [Exhibit 39] with Stillman [R. 298]. Witness further testified that the investigation he was then conducting was

with relation to income tax returns of the Southern California Meat Company No. 2, also Stillman and Segal [R. 299].

Witness Phoebus also testified concerning a conversation he had with appellant Segal [R. 301], and in particular told of a conversation he had had concerning the partnership income tax return [Exhibit 37]. He testified that Segal had told him the item of $13,828.29, reflected on this return, was "side money," and that Segal had given further explanation as to having received this money from customers during 1944, and after that when he worked in the "cooler" of the Southern California Meat Company No. 2 [R. 306]. Witness further testified that Segal stated this was from meat customers.

As stated, a list of Government exhibits and the counts to which certain exhibits were particularly directed, is the following:

GOVERNMENT'S EXHIBITS WITH REFERENCE TO COUNTS.

(NOTE: In most instances, Government's counsel referred to the count the exhibit had reference to.)

Exhibit No.		Page
1.	Invoice No. 6034, dated Oct. 25, 1944 (For Identification)	85
	(In Evidence)	94
	Count 3. Reference is invited to the Exhibit itself.	
2.	Invoice No. 6109, dated Oct. 25, 1944 (For Identification)	85
	(In Evidence)	95
	Count 2. Reference is invited to the Exhibit itself.	
3.	Invoice No. 718, dated Feb, 26, 1945 (In Evidence)	115
	Count 13. Offered in support thereof.	112
4.	Invoice No. 607, dated Feb. 21, 1945 (In Evidence)	117
	Count 5.	

I.

Appellants' Contention That the Indictment Is Void Because of the Assertion That the First Count, the Conspiracy Count, Charges a Felony Conspiracy and a Misdemeanor Conspiracy in the Same Indictment, Is Untenable.

The following will be in answer to contentions raised in appellants' brief, commencing on page 5. Previously in this brief we have set forth Section 205b of the Emergency Price Control Act of 1942 (50 U. S. C. A., Sec. 925). This is the penal provision of the Act.

In urging this point appellants stress certain selected language from the case of *Pinkerton v. United States,* 328 U. S. 640. The language quoted in appellants' brief is, of course, the law as applied to the particular situations there discussed by the court, as is noted from page 643 of the opinion. The facts of such referred to cases are readily distinguishable from the instant one and were so distinguished in the *Pinkerton* opinion.

It is the belief of appellee that this case, *i. e.,*

Pinkerton v. United States, 328 U. S. 640,

is definitely adverse to appellants' contention, and we feel the opinion to be so signficant that we are setting forth certain matters there decided.

The case involved nine substantive counts and one conspiracy count for violation of Internal Revenue Code. The court pointed out, on page 642, that some of the overt acts in the conspiracy count were the same acts charged in the substantive counts, and that each of the substantive offenses found were committed pursuant to the conspiracy. The appellants in the *Pinkerson* case—also as appellants do

here—contended that the substantive counts became merged in the conspiracy count. In answer to this the court stated, page 643:

> "Nor can we accept the proposition that the substantive offenses were merged in the conspiracy."

The court then refers to certain exceptions, the only language quoted from the opinion by appellants, but further states—

> "But these exceptions are of a limited character."

The court continues and states as follows (pp. 643-644):

> "* * * The common law rule that the substantive offense, if a felony, was merged in the conspiracy, has little vitality in this country. It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established. *Clune v. United States,* 159 U. S. 590, 594-595. A conviction for the conspiracy may be had though the substantive offense was completed. See *Heike v. United States,* 227 U. S. 131, 144. And the plea of double jeopardy is no defense to a conviction for both offenses. *Carter v. McClaughry,* 183 U. S. 365, 395. It is only an identity of offenses which is fatal. See *Gavieres v. United States,* 220 U. S. 338, 342. *Cf. Freeman v. United States,* 146 F. 2d 978. A conspiracy is a partnership in crime. *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 253. It has ingredients, as well as implications, distinct from the completion of the unlawful project."

* * * * * * * *

(P. 644):

> "Moreover, it is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive offenses. As stated in *Sneed v. United States, supra,* p. 913, 'If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it.' The agreement to do an unlawful act is even then distinct from the doing of the act."

The Supreme Court pointed out that the petitioner was not indicted as an aider or abettor (18 U. S. C., Sec. 550), nor was his case submitted to the jury on that theory, but continues with this language (pp. 646-647):

> "* * * And so long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that 'an overt act of one partner may be the act of all without any new agreement specifically directed to that act.' *United States v. Kissel,* 218 U. S. 601, 608. Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective. *Wiborg v. United States,* 163 U. S. 632, 657-658. A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy. *Cochran v. United States,* 41 F. 2d 193, 199-200. Yet all members are responsible, though only one did the mailing. *Cochran v. United States, supra; Mackett v. United States,* 90 F. 2d 462, 464; *Baker v. United States,* 115 F. 2d 533, 540; *Blue v. United States,* 138 F. 2d 351, 359. The governing principle is the same when the substantive offense is committed by one of the conspirators in furtherance of the unlawful project. *Johnson v. United States,* 62 F. 2d 32, 34. The criminal intent to do the act is established by the

> formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all. An overt act is an essential ingredient of the crime of conspiracy under §37 of the Criminal Code, 18 U. S. C., §88. *If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense."* (Emphasis ours.)

The sentence last quoted above clearly points out that under such circumstances other acts, in furtherance of the conspiracy done by one conspirator, are attributable to the co-conspirator for the purpose of holding him liable for the substantive offense. The court concludes by stating that a different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy.

It is thus seen that the *Pinkerton* case is directly contrary to appellants' contention.

At the time appellants' brief was prepared the Supreme Court had not as yet decided the case of

Blumenthal v. U. S., 332 U. S. 539 (Dec. 22, 1947).

The *Blumenthal* case was an appeal from this Ninth Circuit, the citation being 158 F. 2d 883. There was joined in the *Blumenthal* appeal the other petitioners re-

ferred to in appellants' brief, namely, *Goldsmith, Weiss* and *Feigenbaum.*

At the time appellants drafted their brief they anticipated that the Supreme Court would, in the *Blumenthal* case, hold that both a felony conspiracy and an alleged misdemeanor conspiracy could not be joined in the same indictment. Appellants contend that the sections of the Act utilizing the words "or to agree to do any of the foregoing," constitute a conspiracy allegation even though contained in a misdemeanor statute.

The Supreme Court, however, on December 22, 1947, held contrary to appellants' views.

The *Blumenthal* case likewise involved a violation of the Emergency Price Control Act, pertaining to the sale of whisky. The significant language of the *Blumenthal* opinion, as applied here, and contrary to appellants' contention, is to be found on page 560, in the footnote:

> "18. These include the argument that petitioners were prosecuted under the wrong statute. Section 4(a) of the Emergency Price Control Act makes it unlawful, as a misdemeanor, §205(b), for any person to sell or deliver any commodity in violation of price regulations, 'or to offer, solicit, attempt, *or agree* to do any of the foregoing.' (Emphasis added.) Petitioners regard the prohibitory words 'or agree,' etc., as repeal by implication of the general conspiracy statute, §37 of the Criminal Code, insofar as otherwise it might apply to the acts forbidden by §4(a). There was no 'implied repeal.' Conviction under the general conspiracy statute requires more than mere agreement, namely, the commission of an overt act. See also *Taub v. Bowles,* 149 F. 2d 817; H. R. Rep. No. 827, 79th Cong., 1st Sess., 7-8."

This Court will recall its recent opinion, holding contrary to appellants' present assertion, in discussing a conspiracy to violate the misdemeanor provisions of this same Act, *i. e.,* Emergency Price Control Act of 1942. Attention is recalled to

Blumenthal v. U. S., 158 F. 2d 883 (C. C. A. 9), aff. 332 U. S. 539.

For further authority holding that the crime of conspiracy is not merged in the completed offense, see:

Lisansky v. U. S., 31 F. 2d 846, cert. den. 279 U. S. 873.

Also:

U. S. v. Simonds, 148 F. 2d 177 (C. C. A. 2).

In passing, we are not unmindful of the case of

Sealfon v. U. S., 332 U. S. 575.

Under the unique circumstances in the *Sealfon* case the second trial of the petitioner, after he had been acquitted on a charge of conspiracy, was held to have amounted to double jeopardy. In other words, the court found that there was an identity of offenses and that the first trial was *res adjudicata* to the subsequent trial for aiding and abetting, under the same facts as where he had been acquitted upon the first trial.

This Circuit has only recently sustained a conviction of joining a conspiracy charge to a substantive charge, which opinion refers to the *Pinkerton* case, *supra.* See:

Nye & Nissen v. U. S., 168 F. 2d 846 (C. C. A. 9, pp. 853-854).

II.

The Indictment Was Neither Void on Its Face, Nor Otherwise Invalid.

Appellants contend, commencing page 7 of their opening brief, that the indictment was void on its face. This contention has reference to the *caption* of the indictment. A mere reading of this caption will illustrate that the term "February, 1945," was a clerical or typographical error. The caption points out that the grand jury had begun but not finished during the September Term of 1945, and "having continued to sit by the order of this court"; then reference is made to February, 1945. The indictment was returned March 11, 1946. As stated, this error in the *caption* is clerical.

This is a matter fairly coming within the provisions of 18 U. S. C., Sec. 556, pertaining to defects of form in indictments.

We agree with appellants that the *body* of an indictment as distinguished from the *caption* cannot be amended; however, even in the body of the indictment, obvious clerical errors have frequently been held as not fatal.

A case illustrating the distinction between the caption and the body is the following:

Brown v. Hudspeth, 103 F. 2d 958 (C. C. A. 10),

in which case the court held that even erroneous statements of time as to when the offense was committed, was not fatal. In the *Brown* case, petitioner contended that the indictment was void because it was found by the grand jury prior to the date it alleged the commission of the crime. The caption utilized the allegations the 7th day of April, 1936, whereas, in the charging part of the indictment the offense was charged to have been committed later, namely, on April 29, 1936. The court, in citing many

cases in support of its position, held contrary to petitioner's contention and stated as follows:

> "The caption is no part of the indictment. It is merely the record of the court and errors therein may be corrected by amendment. The fact that the caption contains an erroneous statement as to the time when the indictment was found is not a fatal defect which vitiates the indictment. The rule has been applied to cases where the caption recited that the indictment was found prior to the date the offense was alleged to have been committed."

While the Rules of Criminal Procedure were not in effect when this indictment was returned (their effective date having been March 21, 1946), it is believed that even Rule 7(c) is contrary to the rather technical contention now urged by appellants.

Appellants cite, on page 8 of their brief, the case of *United States v. Kay*. No citation is given. Counsel for appellants has inadvertently indicated that the last paragraph quoted on such page was taken from the court's opinion. A glance at the transcript will indicate that such paragraph was counsel's own argument at time of trial [R. 87].

The case appellants rely upon is *United States v. Carney,* 163 F. 2d 784 (C. C. A. 9).

The *Carney* case does not support appellants' position. There, the attempt to amend was to the *body* of the indictment as distinguished from the *caption*. Efforts were made to change an error from "K-14" to "A-14," with reference to an alleged counterfeited gasoline ration coupon. This Circuit recognized on page 790 of the *Carney* opinion, in the cases cited, that there is a distinction between the *caption* and the *body* of the indictment.

In the case of

U. S. v. Bornemann, 35 Fed. 824,

the court held that a misrecital in the caption of a date, it reading "1885," for "1888," where from the whole record the error appeared to be merely clerical, is not fatal as the caption is no part of the indictment.

To the same effect:

U. S. v. Clark, 125 Fed. 92 (D. C. Pa.);

Lund v. U. S., 19 F. 2d 46 (C. C A. 8).

In the *Lund* case, by reason of a clerical error, the charge of the offense, even in the body of the indictment, was that it was committed in October, 1925; the information being filed April 8, 1925, correctly the offense should have been charged in October, 1924. The court held that this was not even fatal.

A case holding that an indictment is not invalidated by an obvious error in the repetition of a date, even in the body of an indictment, is that of

Iponnatsu Ukichi v. U. S., 281 Fed. 529 (C. C. A. 9), cert. den. 260 U. S. 729.

Indictments were held good, despite errors existing in same, in the following:

Hogue v U. S., 192 Fed. 918 (C. C. A. 5).

In the *Hogue* case the charge was perjury before a "clerk" rather than "Court," as intended.

Simmons v. U. S., 18 F. 2d 85 (C. C. A. 8).

In the *Simmons* case it was erroneously charged that the grand jury was sworn in "District Court of Oklahoma," when it should have been "Federal District Court."

Attention is also invited to Government's Exhibit No. 40, a certified copy of the District Court's Order for the Continuance of the Grand Jury.

III.

The Indictment Stated an Offense and the Court Committed No Error in Refusing to Dismiss Same.

Commencing on page 9 of Appellants' Opening Brief, the contention is made that the indictment failed to state an offense.

An examination of the indictment will illustrate that the conspiracy count (Count 1) is very specific. It charges that the conspiring commenced on or about July 1, 1943, and continued thereafter until its filing (March 11, 1946). It gave the place; it charged the unlawful conspiring, and then sets forth certain specific paragraphs, from "a." through "k.," alleging not only as to the Emergency Price Control Act of 1942, but also to the therein designated maximum price regulations pertaining to meat, and then followed with several overt acts, namely, from (a) through (r). In the overt acts, dates are mentioned, particular invoices as to their serial number are given, and amounts are designated.

The substantive counts, by way of illustration, Count 2, gave the statutes, the regulation involved, the time and place, the name of the person who had paid to the defendants a sum of money in excess of the maximum ceiling price, the invoice serial number, the amount per pound of the particular meat product as allowed by the regulations as to the date involved. Count 2 is one of the counts charging the sale for over-the-ceiling price.

As an illustration of a count involving a false entry charge, we refer to one of such counts, namely, Count 12. This count is likewise extremely specific. It is difficult to see how any of such counts could have been more specific unless they had been evidentiary.

Allusion is had to appellants' demand for a bill of particulars. Since appellants have discussed this at a later point in their brief, we shall wait to answer that contention at such point.

This Court recently held, with reference to the sufficiency of an indictment and in sustaining same, in the case of

Nissen v. U. S., 168 F. 2d 846 (C. C. A. 9, p. 849),

as follows:

> "This general allegation does not stand alone. It is followed by a detailed description of the means by which the conspirators planned to impede, etc., the government's inspection functions. Taken in context, it is sufficiently definite to inform the defendants of the charges against them. It shows 'certainty to a common intent' and greater particularity is not required. Glasser v. United States, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 68."

The correct rule for determining the sufficiency of an indictment is as follows:

The indictment need only be a "plain, concise and definite written statement of the essential facts constituting the offense charged."

Rules of Criminal Procedure, Rule 7(c).

As the Supreme Court said in *Hagner v. United States*, 285 U. S. 427, 431-4 (1932):

> "The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, 'and

sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran and Sayre v. United States,* 157 U. S. 286, 290; *Rosen v. United States,* 161 U. S. 29, 34."

This indictment clearly meets these tests.

For like authority see

Armour Packing Company v. U. S., 209 U. S. 56,

particularly pages 83 and 84:

"It is alleged that the indictment is insufficient, in that it fails to set out the kind of device by which traffic was obtained, and of what the concession consisted, and how it was granted. Authorities are cited to the proposition that in statutory offenses every element must be distinctly charged and alleged. * * * But an indictment which distinctly and clearly charges each and every element of the offense intended to be charged, and distinctly advises the defendant of what he is to meet at the trial, is sufficient.

"And in *Ledbetter v. United States,* 170 U. S. 606, 612, Mr. Justice Brown, speaking for the court, said:

"'Notwithstanding the cases above cited from our reports, the general rule still holds good that upon an indictment for a statutory offense the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense.'"

This Circuit has sustained an Information which is substantially similar to the charges herein involved and which likewise involve a violation of Maximum Price Regulation No. 169 (beef, etc.), in violation of the Emergency Price Control Act of 1942. See the following:

Flannagan v. U. S., 145 F. 2d 740 (C. C. A. 9).

Appellants also contend, as an additional ground of objection to the indictment, that it failed to allege that the regulations had been first approved by the Secretary of Agriculture. Appellants fail to cite any authority for this contention; in fact, this was not the requirement until July of 1945.

This contention has been definitely decided adverse to appellants' contention.

See the following:

Superior Packing Company v. Clark, 164 F. 2d 343 (Emer. C. A.);

Ormont v. Clark, 164 F. 2d 354 (Emer. C. A.).

In the last cited case, the *Ormont* opinion, the contention had been urged that the Secretary of Agriculture was required to approve the regulations (including R. M. P. R. 169) prior to their being effective. The court held otherwise, as is noted on page 354 at page 355:

> "* * * The reasons for our ruling are fully stated in our opinion in the Superior Packing Company case and need not be repeated here. Suffice it to say that upon the authority of that case we are compelled to reject the contention of the complainant in the present case that the regulations which he attacks were void because they constituted action taken by the Administrator with respect to 'agricultural commodities' without the prior approval of the Secretary

of Agriculture, in violation of Section 3(e) of the Act."

If approval of the Secretary of Agriculture was necessary at a later date, an inspection of the Federal Register will illustrate that such approval was obtained.

The following citations with respect to such approval are all on and after the 1st day of July, 1945, and they all refer to Revised Maximum Price Regulation 169. It should be noted that in the instant indictment all the substantive charges were alleged to have taken effect prior to this date, namely, in 1944 and the early part of 1945, and only the first count, the conspiracy count, charges the continuation of the offense to the date of filing the indictment, namely, March 11, 1946.

The following citations, where the approval of the Secretary of Agriculture was obtained with reference to Revised Maximum Price Regulation 169, are but a few of such citations. Many more could be given; we designate the following:

10 F. R. 9878, issued August 8, 1945; approved by Acting Secretary of Agriculture August 4, 1945;

10 F. R. 11801, issued September 13, 1945; approved by Acting Secretary of Agriculture September 10, 1945;

10 F. R. 13113, issued October 19, 1945; approved by Secretary of Agriculture October 11, 1945;

and many others.

Appellants contend that in referring to the Emergency Price Control Act of 1942, there was an omission to designate "as amended." This is a rather unusual argument. It is obvious that the citation of a statute carries with it all of its amendments; furthermore, but a glance at 50 U. S. C. 901 (this Act) gives the date of its first enact-

ment and its amendments. Paragraph (c) of 901 further states it was again amended June 30, 1944.

The Act in question, namely, 50 U. S. C. 946, designates how the Act may be cited. We quote this section:

> "§946. Short title.
>
> "This Act may be cited as the 'Emergency Price Control Act of 1942.' June 30, 1942, c. 26, Title III, §306, 56 Stat. 27."

Appellants fail to cite any authority to the effect that the Act was not in force at the time the offenses are alleged to have occurred, and the Code expressly provides that even the repeal of statute does not affect existing liabilities unless the repeal expressly so provides.

To this effect see:

1 *U. S. C.,* Sec. 29.

It is difficult to see how appellants were in anywise prejudiced by the indictment failing to use the words "as amended," following the recitation of the Act, and especially is this not required when the Act itself states how it may be cited and therein does not require the utilization of the words "as amended." Judicial notice could readily be taken and should be taken to such amendments without the necessity of express allegations. The case was tried entirely upon the theory of the amendment to the Act rather than the Act as it was initially promulgated.

The *Chambers* and *Hark* cases, cited by appellants, do not support the contention urged by appellants. In fact in the *Hark* case, a case referring to Price Regulation 169, the Supreme Court held contrary to appellant's assertion, in reversing the District Court which had quashed the indictment.

On page 12 (A. B.), under the heading "III," appellants have again raised the same contention with regard to the

absence of alleging "as amended." We feel that we have covered such contentions, excepting that we would like to call the court's attention to the following principles:

It is well settled that even reference to a wrong statute, whether in the caption of the indictment or in the body, does not void the indictment.

To this effect see:

Martin v. U. S., 99 F. 2d 236 (C. C. A. 10);

Biskind v. U. S., 281 Fed. 47 (C. C. A. 6), cert. den. 260 U. S. 731, 28 A. L. R. 1377.

It has also been held that reference to a wrong statute in an indictment does not invalidate the indictment if the acts charged therein are sufficient to constitute an offense under some other statute of the United States.

To this effect see:

Capone v. U. S., 51 F. 2d 609 at 616 (C. C. A. 7), cert. den. 284 U. S. 669;

U. S. v. Hutcheson, 312 U. S. 219 at 229.

"In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. He may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute. See *Williams v. United States*, 168 U. S. 382. On the other hand, an indictment may validly satisfy the statute under which the pleader proceeded, but other statutes not referred to by him may draw the sting of criminality from the allegations. Here we must consider not merely the Sherman Law but the related enactments which entered into the decision of the district court."

IV.

There Was No Error Upon the Part of the Court, Either in Admitting the Income Tax Returns of the Appellants or in the Testimony Given by Internal Revenue Agents of Their Interviews With the Appellants in Conjunction With Income Tax Investigations.

Commencing on page 13 of their brief, appellants have set forth the section of the Internal Revenue Code and the Treasury decisions pertaining to inspection and utilization of income tax returns and other information so obtained by the Bureau of Internal Revenue. We shall endeavor to make our argument, in answer to these matters, as brief as possible.

In the first place, this Circuit has only recently decided a similar if not an identical question as that now urged, adverse to appellants' contention.

We refer to

Shubin v. U. S., 164 F. 2d 377 (C. C. A. 9).

The *Shubin* case was tried on an indictment that was substantially the same as the instant indictment. It was likewise tried before the Honorable J. F. T. O'Connor; it was a case that preceded, in point of time, the instant case by but a few days. It likewise involved a conspiracy charge to violate the Emergency Price Control Act of 1942, together with the pertinent Maximum Price Regulations pertaining to meat products. The substantive charges in the *Shubin* case were virtually the same as those involved in the instant case.

Appellants in the *Shubin* case raised similar contentions to those now being urged in the instant case, with respect to the introduction of income tax returns and statements

which they had voluntarily given to the agents of the Bureau of Internal Revenue. This Circuit held adverse to the contentions there urged and held that the court ruled correctly in admitting such testimony.

In the instant case attention is invited that the witness Segal voluntarily, and not in response to any subpoena, appeared before an agent of the Bureau of Internal Revenue, on or about June 9, 1945, and gave a statement [R. 246]. He was advised that he was not required to make the statement: that he had a right to be represented by an attorney or an accountant, and apparently freely and voluntarily gave such statement [R. 246], in which statement appellant Segal made certain admissions that were utilized in the instant trial.

This statement was Government's Exhibit 33. The testimony of the Internal Revenue Agent Bircher was only given after full and complete authority had been obtained as is required by 26 U. S. C., Sec. 55, and the pertinent regulations under the Treasury decisions.

It should be noted that this testimony was limited as to the appellant Segal [R. 302-304].

Internal Revenue Agent Phoebus gave certain testimony concerning conferences that he had had with the appellants, Stillman and Segal [R. 297 through 308]. Government Agent Phoebus likewise had authority for so testifying.

Appellants contend that the receipt in evidence of testimony of the admissions so made by the appellants violated the Fifth Amendment by compelling them to testify against themselves, and primarily cite in support of their contention *Counselman v. Hitchcock*, 142 U. S. 547. The *Counselman* case is not at point. In that case the witness had been compelled to appear before a grand jury and there refused to give testimony which might tend to incriminate

him, since no immunity was guaranteed. An element of *compulsion* was present in the *Counselman case*. Such is not true here. The record clearly shows that the admissions or statements made by both Stillman and Segal were voluntary and were without any element of compulsion. There was no evidence offered to the contrary. Witness Segal seemed to be anxious to adjust his income tax difficulties even though by so doing he admitted violating ceiling prices established by OPA. He admitted the receipt of sizeable sums of money as "side money" [R. 276, 277 and 279]. Apparently appellants were not concerned with their wilful violations of the OPA law and its regulations but were concerned over their possible tax frauds.

Segal was given an appropriate warning and given the right to refuse to speak or to incriminate himself [R. 246].

In this case we find that all of the requirements were met, to allow the United States Attorney to use the documents and testimony of the agents, as is called for by the statute, for official use. There was thus compliance with every provision of the law and regulation, and the information and documents of the Internal Revenue Agents were duly made available to the Government in conformance with legal requirements.

There was precedence for this procedure. We believe that it is sufficient to set forth such cases with but brief comment:

Gibson v. U. S., 31 F. 2d 19 (C. C. A. 9), cert. den. 279 U. S. 866;

Greenbaum v. U. S., 113 F. 2d 113, 126 (C. C. A. 9);

Lewy v. U. S., 29 F. 2d 462, 464 (C. C. A. 7), cert. den. 279 U. S. 850;

Lewis v. U. S., 38 F. 2d 406 (C. C. A. 9).

In the *Gibson* case the indictment charged a conspiracy to violate the National Prohibition Act. In support of its case the Government there introduced in evidence, over objection, an affidavit made by the defendant six months after the return of the indictment, and which had been delivered to a Deputy Collector of Internal Revenue with the assurance on the part of the Deputy that it would be considered as only bearing on his income tax obligation.

In admitting the testimony with reference to this affidavit, the court pointed out that the Deputy Collector was incompetent to waive such right and held the same admissible, as is indicated on page 22 of the *Gibson* case.

We have indicated that no compulsion was exercised against either of the appellants. It is the opinion of the appellee that the law governing is not that as designated in the *Counselman* case or the *Monia* case, which last mentioned case also referred to testimony given before a grand jury in obedience to a subpoena; but that the law is governed by principles indicated in cases dealing with the distinction between *admissions* and *confessions* and the admissibility of such testimony under such circumstances.

A case sustaining the introduction of *admissions* made to a police officer after the defendant's arrest, even when the defendant appeared to be nervous and jittery and was under the influence of liquor, and was not even warned that such statements might be used against him and had not been charged with any crime, is the case of

Morton v. U. S., 147 F. 2d 28 (C. A. D. C.), cert den. 324 U. S. 825.

The *Morton* case clearly recognizes that the rule with regard to the receipt in evidence of *admissions* are much less onerous than those concerning confessions. After reciting the facts as above noted, the court, on page 31, states as follows:

> "* * * Even a confession, given under such circumstances, would have been admissible. The rules governing the reception in evidence of admissions are much less onerous than those concerning confessions. *There was no reason for an instruction as to the difference between an admission and a confession. That was a question of law, not for the jury, but for the trial judge.* There was no reason for an instruction on what constitutes an involuntary confession, because no confession was offered or received in evidence." (Citing many cases in the footnotes.) (Emphasis ours.)

It is thus seen that in the instant case the *admissions* made by appellant Segal, and even the slight admissions made by the appellant Stillman long before the return of this indictment, and made to agents investigating their income tax liabilities, were not in the nature of confessions but were in the nature of admissions; consequently, there was no duty upon the part of the court to have submitted to the jury the instructions as proposed by the appellants, particularly those set forth on pages 31 and 32 of Appellants' Opening Brief.

A reading of the testimony as is reflected in Government's Exhibit 33—the statement of the appellant Segal—will clearly denote that it was not a confession of the crime charged in this indictment; it amounted to attempted explanations of certain moneys he had received as so-called "gifts" from customers paying him sums of money in

addition to the ceiling price on meats sold. It was of a general nature and did not cover any of the specific charges contained in this indictment, this indictment having been filed about nine months later, namely, in March of 1946.

Even though the statements made by appellants Stillman and Segal to the Internal Revenue Agents might be classified as confessions, still, the following authority justifies their introduction. See:

> *U. S. v. Bayer,* 331 U. S. 532 (particularly on p. 539).

Radovich, one of the appellants who had served with distinction in the Air Forces of the United States Army, was ordered to report to Mitchell Field. He was placed under arrest and confined to the Psychopathic Ward. He was denied callers and communication with others. While under such constraint he made a first confession. This, the Supreme Court held, they would assume was inadmissible. At a later date, Radovich made a second confession to an FBI Agent. At the time of making the second confession he was confined to the Base. He volunteered facts that were not disclosed in the original statement or confession. He was warned that the second statement might be used against him. He requested the original statement —the one that had been taken while he was restricted— and the second one was labeled a supplementary statement and was basically the same as the first. The court permitted the introduction of the second statement although he urged that it was the fruits of the earlier one, and on page 541 of the *Bayer* case stated as follows:

> "* * * The second confession in this case was made six months after the first. The only restraint under which Radovich labored was that he could not leave the base limits without permission. Certainly

> such a limitation on the freedom of one in the Army and subject to military discipline is not enough to make a confession voluntarily given after fair warning invalid as evidence against him. We hold the admission of the confession was not error. *Cf. Lyons v. Oklahoma,* 322 U. S. 596."

The attitude of the Supreme Court with respect to admissions of guilt and the propriety of receiving such in evidence, and the differentiation from the principles announced in the *McNabb* case, is illustrated in the following:

U. S. v. Mitchell, 322 U. S. 65.

In the *Mitchell* case, admissions made immediately after the arrest were held proper and such statements were not nullified, although after making the statements Mitchell was held for eight days before he was arraigned, the court pointing out that the illegality of the contention does not retroactively change the circumstances under which the disclosures were made.

This Circuit has held, subsequent to the *McNabb* and *Anderson* Supreme Court decisions, that testimony is admissible of statements made by the accused to an FBI Agent before any charges had been filed against the accused, where there was no showing of any mistreatment or anything of a negative nature to their being but free and voluntary. To this effect:

Cohen v. U. S., 144 F. 2d 984 (C. C. A. 9).

This Circuit has also held that there is no presumption against a confession and no burden upon the Government to establish its voluntary character.

To this effect see:

Gray v. U. S., 9 F. 2d 337 (C. C. A. 9) 339:

"* * * It is the rule in the federal courts that the fact that a confession is made by an accused person even while under arrest or when drawn out by the questions of an officer does not necessarily render it involuntary. There is no presumption against a confession and no burden upon the government to establish its voluntary character. Murphy v. United States (C. C. A.), 285 F. 801, 807; Sparf v. United States, 156 U. S. 51, 55 S. Ct. 273, 39 L. Ed. 343; Perovich v. United States, 205 U. S. 86, 91, 27 S. Ct. 456, 51 L. Ed. 722."

Even where a defendant denies his guilt and he makes exculpatory statements, such statements are admitted as admissions and the cases hereunder noted point out that the rule with regard to reception of admissions is less onerous than those concerning confessions.

To this effect:

Ercoli v. U. S., 131 F. 2d 354 (C. A. D. C., p. 356);

Beck v. U. S., 140 F. 2d 169 (C. A. D. C.).

It is therefore submitted that the testimony containing admissions upon the part of appellants was clearly admissible. This testimony, including the statement given by Segal, was not in the nature of confessions but rather that of admissions that had been voluntarily made.

V.

The Evidence Was Entirely Sufficient to Justify the Verdict as to Each Count.

There are certain well-established rules governing appeals. Before discussing in detail certain of the contentions urged by appellants with regard to the contended insufficiencies of the evidence, we feel that it will not be amiss to digress and set forth a few of these principles. They are as follows:

1. Appellate courts will indulge all reasonable presumptions in favor of the trial court and draw all inferences permissible from the record, in determining whether the evidence is sufficient to sustain a conviction.

To this effect:

Henderson v. U. S., 143 F. 2d 681 (C. C. A. 9).

2. Appellate courts will rarely substitute its views on the weight of the evidence for those of the jury, even though the appellate court might have reached a different conclusion.

To this effect see:

Jordan v. U. S., 87 F. 2d 64 at p. 67 (C. A. D. C.).

3. Normally, the sufficiency of the evidence is a jury question. A fairly recent case in support of this proposition, and pointing out that the appellate court is not called upon to weigh conflicting testimony but only to determine whether there was some evidence competent and substantial before the jury, fairly tending to support the verdict, is

Hemphill v. U. S., 120 F. 2d 115 (C. C. A. 9), cert. den. 314 U. S. 627.

To like effect:

Crumpton v. U. S., 138 U. S. 361.

In view of the above well-settled principles, an analysis of the testimony will clearly show that there was sufficient evidence before the jury to have found the existence of a conspiracy upon the part of both Stillman and Segal. They were both engaged in the same common enterprise. The testimony clearly shows that Segal told several retail meat merchants that they would have to pay a sum of money in excess of the ceiling price; that Stillman did likewise, as to at least one of such merchants, the witness Muehlberger [R. 90 and 93]. The evidence shows that the invoices did not reflect the true price as to those counts pertaining to false entries, and likewise as to the count pertaining to the alteration of the books of the partnership, Count 32.

The evidence also shows that there was the existence of a partnership, first under the name of the Southern California Meat Company No. 2, existing between Stillman and Segal, commencing in August of 1944, and following which an additional partnership existed between Stillman, Segal and Rosensweig, commencing about January of 1945, under the name of Central Packing Company.

Appellants contend that there is no proof of an unlawful agreement. This Circuit, and others, has repeatedly held that the proof of an unlawful agreement may be had by circumstantial evidence. To such effect see the often quoted case of

Marino v. U. S., 91 F. 2d 691 at p. 694 (C. C. A. 9).

In a very recent case from this Circuit, this rule is again announced. See:

Nye & Nissen v. U. S., 168 F. 2d 846 (C. C. A. 9).

This Court, on page 852 of the *Nye & Nissen* opinion, stated as follows:

> "The existence of a conspiracy may be inferred from acts of persons which are done in pursuance of an apparent criminal purpose. Blumenthal v. United States, 9 Cir., 158 F. 2d 883, affirmed 332 U. S. 539, 68 S. Ct. 248.
>
> * * * * * * * *
>
> "Once the existence of a conspiracy is clearly established, slight evidence may be sufficient to connect a defendant with it. Meyers v. United States, 6 Cir., 94 F. 2d 433, certiorari denied 304 U. S. 583, 58 S. Ct. 1059, 82 L. Ed. 1545; Phelps v. United States, 8 Cir., 160 F. 2d 858. The evidence here is more than slight."

A case additionally to point is the following:

Braverman v. U. S., 125 F. 2d 283 (C. C. A. 6) (reversed on other grounds, 317 U. S. 49).

In the *Braverman* case the rule with respect to reasonable inferences that may be drawn from all the facts and circumstances, to show the existence of the conspiracy, is noted in the following language (p. 286):

> "The rule of our circuit and others was clearly stated and approved by Mr. Justice Sutherland, retired, with whom sat the present Chief Justice and Circuit Judge Clark in United States v. Manton, 2 Cir., 107 F. 2d 834, 839: 'It is not necessary that the participation of the accused should be shown by

direct evidence. The connection may be inferred from such facts and circumstances in evidence as legitimately tend to sustain that inference. Indeed, often if not generally, direct proof of a criminal conspiracy is not available and it will be disclosed only by a development and collocation of circumstances. In passing upon the sufficiency of the proof it is not our province to weigh the evidence or to determine the credibility of witnesses. We must take that view of the evidence most favorable to the government and sustain the verdict of the jury if there be substantial evidence to support it. Hodge v. United States, 6 Cir., 13 F. 2d 596; Fitzgerald v. United States, 6 Cir., 29 F. 2d 881."

It is, of course, well settled that co-defendants may be liable even though they only aid and abet one another. This principle is statutory.

18 *U. S. C.,* Sec. 550.

There are many cases construing this point, including the previously cited case of *United States v. Pinkerton,* 328 U. S. 640 at p. 647.

This principle is acknowledged in this Circuit in the *Nye & Nissen* case, *supra,* page 854 of the opinion.

Additional authorities upon the principle of holding joint confederates liable for the acts of the confederate, even under substantive charges upon the theory of aiding and abetting, are the following cases:

Bozza v. U. S., 330 U. S. 160 at p. 164;

Borgia v. U. S., 78 F. 2d 550 (C. C. A. 9), cert. den. 296 U. S. 615;

U. S. v. Olweiss, 138 F. 2d 798 at p. 800 (C. C. A. 2), cert. den. 321 U. S. 744.

VI.

The Court's Instruction With Respect to the Maximum Ceiling Price Allowed for the Meat, Was a Correct Statement of the Law.

It is difficult to see how counsel for appellants can now complain of this instruction. Our search of the transcript fails to reveal either a general or specific objection to this particular instruction. In fact, the record reveals that counsel for appellants did, in effect, stipulate that the figures of the price noted per pound on the invoices of meat sold were the maximum ceiling prices, or that the witness would so testify.

A review of the testimony of the witness Edward F. Cunningham [R. 288 to 291] reveals that Cunningham, a Specialist from the OPA, was called upon to examine all of the invoices of the Government's exhibits that had theretofore been introduced into evidence, namely, the invoices of certain specific sales to the merchants who had purchased meat from the appellants. Counsel for the Government stated that the witness Cunningham would testify, as to each invoice, that the prices shown thereon were the maximum ceiling prices for such meat items on those particular dates, to which counsel for appellants stated, "We will so stipulate, your Honor, and shorten this line of testimony" [R. 290].

Even though appellants should continue to object to this instruction we feel that the law is definitely adverse to their contention, as is illustrated in a rather recent case from this Circuit, namely:

Flannagan v. U. S., 145 F. 2d 740 (C. C. A. 9).

The *Flannagan* case points out that a publication in the Federal Register of a maximum price regulation creates a rebuttal presumption of notice to one subsequently selling beef at a lower price, and further points out as follows (p. 742):

> "There is no merit in the objection. A willful sale at an excessive price necessarily implies a specific intent to sell it at such a price. The court had previously instructed the jury that the applicable maximum was 22¼ cents per pound. No objection was made as to the amount, but it was objected that the court could not state it and that the jury alone must figure it from the provisions of the regulation. The court properly overruled the objection. The regulation, having the force of law, determines the maximum price. Hence it was proper for the court to advise the jury what was the amount so legally fixed."

The *Flannagan* case is also authority to the contention urged by appellants with regard to the element of intent, for in such case this Circuit held that a wilful sale at an excessive price necessarily implies specific intent to sell it (meat) at such price.

In replying to appellants' present objection to the court's instruction as to maximum ceiling prices allowed for the sale of the meat, we are not unmindful of a late decision of this Circuit, *i. e.,*

> *Saul Samuel, et al., v. U. S.,* 169 F. 2d 787 (C. C. A. 9).

The *Samuel* case is distinguishable from the instant case. The *Samuel* case involved a conspiracy charge regarding the sale of whisky; three separate statutes were charged to have been violated. In the instant case no objection

appears to have been made to the court's instruction now complained of; furthermore, this instruction is a correct statement of the law and the relevant regulations. In the *Samuels* case the trial court had erroneously defined one of the three laws involved in the conspiracy charge, hence there was no way of determining whether the verdict was based upon a correct or incorrect instruction.

VII.

No Reversible Error Occurred, Either in the Admission or Exclusion of Evidence.

Commencing on page 38 of appellants' brief, argument is made with respect to certain evidence admitted and certain evidence excluded.

It is not the desire of appellee to specifically go over all of the evidence to show why the court's rulings were proper. In our Statement of Facts we have endeavored to but summarize the evidence; however, we feel that a reading of the transcript will clearly reveal that no reversible error occurred in the matters now singled out by appellants.

The complaints now urged go more to the weight than the admissibility of the evidence. By way of illustration each of the witnesses, the retail meat merchants, testified that they paid an additional sum per pound over and above that reflected on the invoice. This was not a question of any foundation having to be laid. It was a matter of the best recollection of the witness.

No error was made in admitting the testimony of Phoebus, Agent of the Bureau of Internal Revenue. We have heretofore shown, in our Statement of Facts, that authority was requested and obtained for this Agent to

testify. He testified concerning relevant admissions that had been voluntarily made to him by the appellants. No compulsion had been used, nor had any promise been held forth.

The books of the California Meat Company had been given to witness Phoebus by one of the appellants, Stillman, in response to a request upon the part of the witness Phoebus to be permitted to inspect these records [R. 295 and 297].

No error was committed by reason of the testimony of the witness Namson. This witness testified as to certain conversations Stillman and Segal had had in his presence. These conversations contained material admissions. Witness Namson was a private person, not a Government agent. There is nothing to show but what such statements made by Stillman and Segal were other than free and voluntary.

On page 40, appellants set forth three proposed instructions which the court did not give. A reading of the record will show that each and every material element involved in the case was clearly covered by the court's very ample instructions. It should be recalled that neither of the appellants took the stand. All affirmative evidence came from Government witnesses.

The instructions set forth, which the court refused to give, were either entirely covered by other instructions or else were of such a character that it would not have been proper to have given them. In the first place, while good faith is a defense in a charge such as a mail fraud case, still, in a case of this character where the evidence clearly shows that both defendants suggested to purchasers that they would have to pay an over-ceiling price per pound for

meat before they could obtain it, the element of good faith was not even present. No testimony upon the part of appellants existed in the record which would tend to show they were even operating under good faith. This Court has held in a like case, namely, that of selling beef for over-ceiling price, that a wilful sale at excessive price necessarily implies specific intent to sell at such price. To such effect:

Flannagan v. U. S., 145 F. 2d 740.

It is well settled that instructions must be considered in their entirety and that if the entire instructions cover all essential elements, no prejudice results. To this effect see:

U. S. v. Sorcey, 151 F. 2d 899 (C. C. A. 7);

Taylor v. U. S., 142 F. 2d 808 at p. 817 (C. C. A. 9), cert. den. 323 U. S. 723.

To the same effect:

Hargreaves v. U. S., 75 F. 2d 68 at p. 73 (C. C. A. 9), cert. den. 295 U. S. 759.

"It is a well-settled principle of law that in determining the correctness of instructions, detached phrases and sentences cannot be singled out and considered alone, but must be construed with their context. Colt v. U. S., 190 F. 305, 308 (C. C. A. 8); Michael v. U. S., 7 F. 2d 865, 866 (C. C. A. 7)."

The rule with respect to instructions is well announced in a rather recent case, namely:

Pine v. U. S., 135 F. 2d 353 at p. 355 (C. C. A. 5), cert. den. 320 U. S. 740.

Even if error occurs in part of the instruction, such error is not reversible, if it is cured by a subsequent charge or by a consideration of the entire charge.

To this effect:

Clarke v. U. S., 132 F. 2d 538 (C. C. A. 9), cert. den. 318 U. S. 789.

The rule is also well settled that when the evidence as a whole is convincing toward the defendant's guilt, reversible error does not necessarily occur from an erroneous instruction; to this effect:

Roubay v. U. S., 115 F. 2d 49 (C. C. A. 9).

VIII.

The Court Did Not Err in Refusing to Grant Defendants' Request for a Bill of Particulars.

It has heretofore been pointed out that this indictment was quite specific. It was surely sufficiently definite to inform the defendants of the charges against them.

It is well settled that a bill of particulars is properly denied where the indictment is reasonably definite as to the offense charged. To this effect:

Robinson v. U. S., 33 F. 2d 238 (C. C. A. 9).

And the true rule is, that the discretion of the court in denying a bill of particulars is not reviewable except in a case of abuse of discretion.

To this effect see:

Wong Tai v. U. S., 273 U. S. 77.

Quotation from two opinions which we feel are most appropriate, are the following:

Nye & Nissen v. U. S., 168 F. 2d 846 at p. 851 (C. C. A. 9).

"It is elementary, of course, that the denial of a bill of particulars is not ground for reversal if it does not amount to an 'abuse of discretion.' Wong Tai v. United States, 273 U. S. 77, 47 S. Ct. 300, 71 L. Ed. 545. We agree with appellee that the indictment here is an exceedingly specific document, and that no abuse of discretion is shown to have resulted from the trial court's refusal to compel disclosure of further particulars. Although it may be true that defendants could not have known in advance of trial what various facts and circumstances were to be relied upon by the government as proof of the alleged conspiracy, this does not necessarily indicate that they were prejudiced by the denial of their motion. The government should not be compelled by a bill of particulars to make a 'complete discovery' of its entire case. Braatelien v. United States, 8 Cir., 147 F. 2d 888; Rubio v. United States, 9 Cir., 22 F. 2d 766, certiorari denied 276 U. S. 619, 48 S. Ct. 213, 72 L. Ed. 734."

Kempe v. U. S., 151 F. 2d 680 at p. 685 (C. C. A. 8).

"* * * As heretofore shown, the information referred specifically to the regulations and the statutes involved. The purpose of a bill of particulars is to secure facts, not legal theories. Rose v. United States, 9 Cir., 149 F. 2d 755, 758; Flannagan v. United States, *supra.*

"In Braatelien, *et al.*, v. United States, 8 Cir., 147 F. 2d 888, 892, this court said: 'Moreover, a motion for a bill of particulars is addressed to the sound discretion of the court and, unless it is made to appear that this discretion has been abused, the ruling will not be reversed. Hartzell v. United States, 8 Cir., 72 F. 2d 569, 575; Pines v. United States, 8 Cir., 123 F. 2d 825, 829.'

"We are convinced that the defendant was not lacking as to information of the acts charged to have been committed by him and the regulations and statutes violated thereby. Thus the court did not err in overruling the motion for a bill of particulars."

Under this same heading, that is, on page 41, and thereafter, of appellants' brief, other contentions are urged in addition to those with respect to a bill of particulars. These are repetitions of contentions previously urged by appellants; we feel that we have covered them at other portions of this brief.

One contention which, however, is rather unique, is to the effect that there is no evidence of the promulgation or publication of these regulations in the Federal Register. This is not required. The court will take judicial notice of such publication. Defendants in this case were charged with knowledge of such regulations. Their publication created a rebutable presumption of notice to the defendants. Such is so declared by statute 44 *U. S. C.*, Sec. 307. Also, to like effect:

Flannagan v. U. S., supra.

IX.

The Court's Ruling in Denying Both the Motion for Judgment of Acquittal and the Motion in Arrest of Judgment, Was Proper.

On page 43, appellants set forth reasons why they feel a motion in arrest of judgment should have been granted. All of these various six grounds as there designated have been heretofore covered and answered in this, appellee's brief. We have endeavored to illustrate why such contentions were untenable and not grounds for reversal.

On page 42, appellants contend that a motion for acquittal should have been granted for reasons that have previously been advanced by appellants in their brief, that is, for the contended insufficiency of the evidence, etc.

As we have heretofore pointed out, no affirmative evidence was offered by the appellants. There was certainly sufficient evidence introduced to support the jury's verdict of the existence of the concpiracy, to show guilty knowledge upon the part of both appellants, and to support the jury's verdict as to the substantive counts wherein each appellant was found guilty. It would serve no useful purpose to further review such evidence. It has been summarized in our Statement of Facts.

This Court is of course well aware that with respect to a motion for directed verdict, which is the same as the newer motion for a judgment of acquittal, the rule is that the defendant's guilt should be submitted to the jury if there

is any "proper," "legal," "competent," or "substantial" evidence sustaining the charge. To this effect:

Maugeri v. U. S., 80 F. 2d 199 at p. 202 (C. C. A. 9).

"As to the requests for a directed verdict, it is well settled that, on motion for a directed verdict for the defendant in a criminal case, if there is any 'proper,' 'legal,' 'competent,' or 'substantial' evidence sustaining the charge, it should be submitted to the jury."

To the same effect:

Gorin v. U. S., 111 F. 2d 712 at p. 721 (C. C. A. 9), affirmed 312 U. S. 19.

It is well settled that where a motion for a directed verdict is made, the Appellate Courts must view the evidence in the light most favorable to the appellee. This Circuit has so ruled. Also see:

Canella v. U. S., 157 F. 2d 470 (C. C. A. 9);

Borgia v. U. S., 78 F. 2d 550 at p. 555 (C. C. A. 9), cert. den. 296 U. S. 615.

We have heretofore called attention that the sufficiency of the evidence is a jury question.

To this effect:

Hemphill v. U. S., 120 F. 2d 115 (C. C. A. 9), cert. den. 314 U. S. 627;

Yoffe v. U. S., 153 F. 2d 570 (C. C. A. 1).

Conclusion.

It is respectfully submitted that there was substantial evidence supporting the verdict of guilty, of the appellants, on the counts of which they were found guilty.

No error of a reversible nature occurred at the trial.

In view of the foregoing, and in view of the contentions urged in this, Appellee's Reply Brief, it is respectfully submitted that the verdict and judgment as to both of the appellants should be affirmed.

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APPENDIX.

Maximum Price Regulations Nos. 148, 169 and 239 are price regulations issued pursuant to the Emergency Price Control Act of 1942.

Maximum Price Regulation No. 148 deals with dressed hogs and wholesale pork cuts. Maximum Price Regulation No. 169 deals with beef and veal carcasses and wholesale cuts. Maximum Price Regulation No. 239 deals with lamb and mutton carcasses and wholesale cuts.

Revised Maximum Price Regulation No. 169 in part provides (7 Fed. Reg. 10381, as amended, issued December 10, 1942, effective December 16, 1942):

> "Section 1364.406 Evasion. (a) The price limitations set forth in this Revised Maximum Price Regulation No. 169, shall not be evaded, either by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to beef or veal, separately or in conjunction with any other commodity or service, or by way of any commission, service, transportation, wrapping, packaging or other charge or discount premium or other privilege, or by tying agreement or other trade understanding, or by changing the selection of, grading, or the style of dressing, cutting, trimming, cooking or otherwise processing, or the canning, wrapping or packaging of beef or veal or otherwise: * * *"

Section 1364.407 Records and reports. * * *

> "(a) Every person making a sale and every person in the course of trade or business making a purchase of any beef carcass, beef wholesale cut, veal carcass or veal wholesale cut or other meat item subject to

this revised regulation, shall make and preserve for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, complete and accurate records of each such sale or purchase, showing the date thereof, the name and address of the buyer and seller, the quantity, type of cut or item, grade or grades and the weight of all beef carcasses, beef wholesale cuts, veal carcasses and veal wholesale cuts or other meat items subject to this revised regulation sold or purchased and the price charged or received or paid therefor. * * *"

"Section 1364.401. Prohibition against selling beef and veal carcasses and whole cuts at prices above the maximum.—(a) Beef carcasses and wholesale cuts. On and after December 16, 1942, regardless of any contract, agreement, or other obligation no person shall sell or deliver any beef carcass or beef wholesale cut, and no person shall buy or receive [33] any beef carcass or beef wholesale cut, and no person shall buy or receive any beef carcass or beef wholesale cut at a price higher than the maximum price permitted by Section 1364.451; and no person shall agree, offer, solicit or attempt to do any of the foregoing. * * *"

There are in effect substantially similar provisions in Revised Maximum Price Regulations 148 as to pork, and 239 as to lamb, except that under Revised Maximum Price Regulation 148 there is no evasion provision such as above, and the record keeping provision is in different terms. The substance of the regulation is that certain records must be kept including such as are involved in this case and that they must be truthful and cannot be wilfully made false.